(24,659)

SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 104

WESTERN TRANSIT COMPANY,
Plaintiff-in-Error,

AGAINST

A. C. LESLIE & COMPANY, LTD.,
Defendant.

BRIEF FOR PETITIONER

On Writ of Error to the Supreme Court, Appellate Division, Fourth Department, State of New York

LESTER F. GILBERT,
Counsel for Plaintiff-in-Error.

(24,659)

SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 104

WESTERN TRANSIT COMPANY,

Plaintiff-in-Error,

AGAINST

A. C. LESLIE & COMPANY, Ltd.,

Defendant.

BRIEF FOR PETITIONER

On Writ of Error to the Supreme Court, Appellate Division, Fourth Department, State of New York

LESTER R. GILBERT,

Counsel for Plaintiff-in-Error.

INDEX

LIST OF CASES.

(Indexed to names of both parties.)

PAGE

PAGE

PAGE

PAGE

PAGE

(24,659)

SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 104

WESTERN TRANSIT COMPAY,
Plaintiff-in-Error,

AGAINST

A. C. LESLIE & COMPANY, LTD.,
Defendant.

BRIEF FOR PETITIONER

On Writ of Error to the Supreme Court, Appellate Division, Fourth Department, State of New York

STATEMENT OF CASE

This case comes to this Court on writ or error (page 77), granted to review a judgment of the Supreme Court, State of New York, Fourth Department (pages 48-49), entered on an order of the Appellate Division of the said State Supreme Court (page 47), unanimously affirming a judgment and order of the said State Supreme Court in and for the County of Erie (pages 37-38), which said judgment affirmed a judgment of the City Court of

Buffalo entered in the office of the Clerk of the City Court of Buffalo on the 20th day of February, 1913, in favor of the plaintiff and against the defendant in the sum of $340.17 and $30.95 costs and disbursements (pages 35, 36, 37), after a trial without a jury. Application for leave to appeal to the Court of Appeals of the State of New York was denied both by the Appellate Division (pages 50-51), and by the Hon. William H. Cuddeback, Associate Judge of the Court of Appeals (pages 51-52). The aforesaid judgment of the Supreme Court of New York State in and for the County of Erie, was for the sum of $371.12 and costs. Said costs amounted to $25.00 (pages 37-38). The costs in the Appellate Division amounted to $89.84 (pages 48-49).

Findings of fact were made and an opinion written by the Hon. Peter Maul, Judge of the City Court of Buffalo (page 35), and an opinion was also written by the Hon, Herbert P. Bissell, who heard the appeal at Special Term of the New York Supreme Court (pages 38-41, inclusive). No opinion was written by the Appellate Division (pages 49-50).

Most of the facts in this litigation were stipulated (pages 7-13). The only question upon which testimony was taken was as to what happened to the copper involved herein after it reached Buffalo, which issue of fact has been decided in favor of defendant-in-error and is no longer open. The decision of this Court must therefore rest upon the undisputed facts as they were stipulated (pages 7-13), as follows:

On September 23, 1908, 25 tons of copper was shipped from Houghton, Michigan, consigned to the New York Metals Selling Company at New York City (page 7), under a bill of lading prepared in the form approved by the Interstate Commerce Commission, and which contained the following provisions:

> "Forwarded via steamer "Buffalo" to port of ————, thence via ———— RR. to Destination" (page 10).
>
> "It is mutually agreed in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property that *every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained,* and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable.
>
> "SUBJECT TO CONDITIONS AS PRINTED ON BACK HEREOF" (page 10).

Condition three printed on the back reads in part, as follows:

> "The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of

lading, *unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation* (page 11).

On the face of the bill was written the following,

"To be held at Buffalo for orders."

"Value not to exceed $100.00 per net ton. Limited by written agreement."

"The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable, because of the lower rate thereby accorded for transportation" (page 10).

The freight upon this shipment was based upon and governed by interstate tariffs, properly filed, etc., as required by the Interstate Commerce Act, and which provided as follows:

"Copper ingots, minimum weight as per official classification value not to exceed $100 per ton, 18 cents per ton.

Copper ingots, minimum weight as per official classification, valuation not expressed, 30 cents per ton" (page 7).

The shipment was made at the released valuation, and the freight of 18 cents per ton was charged and paid (pages 7, 10).

On arrival at Buffalo by the Steamer "Buffalo," on September 30, 1908, the copper was there held subject to the shipper's further directions and orders, pursuant to the written instructions indorsed on the bill of lading (page 7). It was at once placed in the Western Transit Warehouse (page 28), and on November 26, 1908, the plaintiff-in-error wrote the Leslie Company advising of the arrival and notifying them that the goods would be held at Buffalo as directed by the bill of lading subject to storage circular I. C. C. No. 236, copy of which was enclosed (pages 7, 8). This circular had been duly filed, posted, etc., as required by the Act to Regulate Commerce and provided and follows (page 9):

> "The Western Transit Company will accept shipments of Copper and Copper Matte, Pig Lead and Spelter for storage and diversion at Buffalo, under the following rules:
>
> 1. The Western Transit Company, at request of owners, will furnish free storage on shipments of Copper and Copper Matte, Pig Lead and Spelter in transit, at Buffalo, for a period not exceeding four months.
>
> 2. If held longer than four months, it will be subject to a charge of one-half (½) cent per 100 pounds for each thirty (30) days or part thereof so held.

3. Shipments held under this arrangement will be at owner's risk, and will not be be accepted for storage unless arrangements are made with the undersigned previous to forwarding from Western Lake Ports.

4. Shipments ordered out of store will be charged at the through rate in effect at time the shipment originated, to points to which through rates are published by the Western Transit Company.

5. Shipments ordered to points to which no through rates are in effect via The Western Transit Company, will be charged at the local rate to and from Buffalo."

All the copper with the exception of the 36 bars now in question was subsequently forwarded as desired by the shipper (page 3). These 36 bars were never delivered by the Transit Company, though demand therefor was made (page 8).

At the trial, plaintiff-in-error attempted to avoid liability for its failure to deliver the copper by showing that it was stolen from the warehouse on the night of January 13th, 1909, while still held awaiting shipper's orders. Though negligence on the part of the Transit Company in connection with the theft was contested in the courts below, it must now be accepted as an established fact. The actual market value of the stolen ingots was $271.38, the total weight being 1,882 pounds, and the value per pound $.1442 (page 8).

On the basis of the released valuation clause of $100 per ton, contained in the bill of lading, the value was $94.10. The questions to be decided are "DOES THE RELEASED VALUATION CLAUSE OF THE BILL OF LADING APPLY TO THE CASE AND WHAT IS ITS EFFECT?

These Federal questions were properly raised in the following manner: In the complaint it is alleged that the copper was held and kept in storage pursuant to storage circular I. C. C. No. 23 (page 3). The answer alleges the valuation agreement, setting forth the bill of lading in full (page 6). The stipulation between the parties contained both the bill of lading and storage circular and also provisions as to the tariffs with particular reference to the valuation clauses and the different rates applicable to different valuations (pages 7-12). It was further specifically stipulated that the copper was held in Buffalo subject to plaintiff's direction pursuant to the terms of the bill of lading (page 7). That the questions were distinctly before the trial court and definitely decided is evident from an examination of the cases of *Carleton vs. Union Transfer & Storage Co.*, 137 N. Y. App. Div., 225, and *Barnes vs. New York Central and H. R. R. R. Co.*, 138 N. Y. App. Div., 913, relied upon by that court in its opinion (page 35). An examination of Judge Bissell's opinion (pages 38-41) discloses the fact that the Federal questions were again before the Court. The briefs of both parties in all the courts discussed principally these Federal questions. The Federal questions were necessarily involved and properly raised.

Georgia, Florida and Alabama Railway Company vs. Blish Brothers Milling Company, 241 U. S., 190.
Southern Railway Company vs. Prescott, 240 U. S., 632.

SPECIFICATION OF ERRORS

The plaintiff-in-error relies upon the assignments of error in raising the following questions of law:

First: The trial court erred in giving judgment for the plaintiff for $271.38 with interest, being the full actual value of the ingots not delivered to the defendant-in-error for the reason;

(a) That upon the pleadings and stipulated facts, recovery should have been based upon and governed, regulated and controlled by the so-called valuation clauses of the tariff, bill of lading and storage circular, under the whole of the Act to Regulate Commerce of February 4th, 1887, and the amendments thereof and provisions supplemental thereto and particularly Sections 1, 6 and 20 thereof, as amended, and the filed tariff, bill of lading and storage circular, when each and all of the same are properly construed.

(b) That said judgment was for a sum in excess of that justly and legally recoverable under said Act, amendments, tariff, bill of lading and storage circular as above set forth, when each and all of the same are properly construed.

(c) That said judgment was a decision that under said Act, amendments, tariff, bill of lading and storage circular above set forth when the

same are properly construed, the valuation clauses so-called under the bill of lading did not apply while the goods were in storage under the facts of the case.

(d) That the rights, privileges and immunity under said Act, amendments, tariff, bill of lading, and storage circular above set forth when the same are properly construed, which said rights, privileges and immunity were especially set up and claimed by the plaintiff-in-error, was denied, to the plaintiff-in-error, by said judgment, for the reason that said judgment was for a sum in excess of that justly and legally recoverable under said Act, amendments, filed tariff, bill of lading and storage circular, as above set forth when each and all of the same are properly construed.

Second: The trial court erred, if judgment for the plaintiff were to be given at all, in rendering judgment for the plaintiff in excess of $94.10, being the value of the ingots not delivered to the defendant-in-error, based upon the valuation clauses of the tariff, bill of lading and storage circular, for the reasons above set forth (a), (b), (c), (d).

QUESTIONS TO BE DECIDED

To answer the questions "Does the released valuation clause of the bill of lading apply to this case and what is its effect?", the following questions must be answered:

(a) Was the storage an incident to and an integral part of interstate commerce and hence subject solely to the Federal rules?

(b) What was the effect of the released valuation clause under the Federal rules?

POINT I.

The storage was incident to and an integral part of the transportation in interstate commerce, and is subject solely to the federal rules governing such transportation.

Since it is stipulated that the shipment was interstate it can no longer be questioned that if the loss had occurred during the actual transit while the goods were in physical motion, the limitation of liability agreed upon with the carrier for the purpose of obtaining the lower of two freight rates, would be binding upon the plaintiff.

Adams Express Company vs. Croninger, 226 U. S., 491.

Kansas City Southern Railway Co. vs. Carl, 227 U. S., 639.

Missouri, Kansas & Texas Railway Co. vs. Harriman, 227 U. S., 657.

and cases cited under Point II.

"The question is, whether the liability may be deemed to have spent its force upon the completion of the carriers service as such, or

must be held to control, also, during the ensuing relation of warehouseman."

Cleveland, Cincinnati, Chicago & St. Louis Railway Co. vs. Dettlebach, 239 U. S., 588-591.

This court laid down the following proposition in *Adams Express Company against Croninger,* 226 U. S., 491, at pages 504 and 505, referring to the Hepburn Act.

"Prior to that amendment the rule of carriers' liability for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States (*Hart v. Pennsylvania Railroad Co.,* 112 U. S., 331, or that determined by the supposed public policy of a particular state (*Pennsylvania Railroad Co. v. Hughes,* 191 U. S., 477, or that prescribed by statute law of a particular state (*Chicago, etc., Railroad Co. v. Solan,* 169 U. S., 133).

Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject." * * *

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject, results from its general character. It embraces the subject of the liability of the carrier under a bill of lad-

ing which he must issue and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

Chicago, St. Paul, Minneapolis and Omaha Railway Co. vs. Latta, 226 U. S., 519.

Chicago, Burlington and Quincy Railway Co. vs. Miller, 226 U. S., 513.

Missouri, Kansas and Texas Railway Co. vs. Harriman, 227 U. S., 657.

Wells Fargo & Company vs. Neiman-Marcus Company, 227 U. S., 469

Boston & Maine R. R. Co. vs. Hooker, 233 U. S., 97-100.

Boyle vs. Bush Terminal Company, 210 N. Y., 389.

These authorities unqualifiedly established the proposition that every incident of interstate commerce is within the purview of the Hepburn Act, and thus subject exclusively to the Federal Rules. The broad extent to which the Interstate Act as

amended now reaches the detail of the business of interstate transportation, is pointed out with particular clearness in *Boston & Maine R. R. Co vs. Hooker,* 233 U. S., 97, 116, 119, although the present question is not there expressly decided.

These cases are but few of the many which show the far-reaching character of the Interstate Commerce Act.

That storage in transit, such as occurred in the instant case, falls within this all-pervading statute, appears from the very terms of the Act itself. Section 1, paragraph (1) as amended by the Hepburn Act of June 29, 1906, provides that the Act applies to interstate transportation and paragraph (2) defines "transportation" (which before the amendment included merely "all instruments of shipment or carriage"), as including

> "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, *storage, and handling of property transported;* and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish *such transportation* upon reasonable request therefor and to establish through routes and just and reasonable rates applicable thereto."

The proviso clause of paragraph (1) whereby intrastate commerce is excluded from the opera-

tion of the Act, also contains the word "storage," in the following phrase:

> "The provisions of this Act shall not apply to the transportation of passengers or property or to the receiving, delivering, *storage or handling of property* wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid," etc.

Paragraph (3) provides in part as follows:

> "All charges made for *any service* rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section (6) provides for the filing of rate schedules, and contains the following:

> "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, *storage charges,* icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or

> the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee."

It would seem that these provisions would make further discussion unnecessary were it not for the decisions of the courts below in the case at bar. What can Congress have had in mind when it used the word "storage" if not precisely the present situation? "Storage" must of physical necessity be stationary, and taken in and of itself apart from all surrounding circumstances must take place within one state. Thus limited and restricted it could never be a part of interstate commerce. Such an interpretation, however, is not only contrary to the physical necessity of railroad and allied marine commerce, but is contrary to the very words of the Act. The word "storage" must either be stricken from the act as utterly meaningless or must be given a rational and workable meaning.

It will not be presumed that Congress did a vain thing when it defined transportation as including storage, particularly in an Act so vital to the interests of every citizen and one drawn with such prolonged debate and under such universal and intense public scrutiny as this Act was. Rather will the word be taken in connection with the rest of the Act and be interpreted to mean such storage as is essential to and integral with an interstate shipment of property.

Particularly is this so when the language of the Hepburn Amendment is considered in the light of the original Act. The very purpose of the amendment was to so broaden the scope of the law as to include all services related to interstate traffic, and thus make effective its operation and prevent unfair discrimination from being made under the guise of separate service.

Atlantic Coast Line Railroad Company vs. Riverside Mills, 219 U. S., 186, 199, 203.

New York, Philadelphia and Norfolk Railroad Company vs. Peninsular Exchange of Maryland, 240 U. S., 34, 37.

Southern Railway Company vs. Prescott, 240 U. S., 632, 638.

Fortunately it is not necessary for the plaintiff-in-error to rely solely upon a line of reasoning based on the verbiage of the Act, for, since the decision of the present case by the Appellate Division, this Court has handed down opinions in two cases which seem squarely upon all fours with the case at bar, on the facts, and to be decisive of the point at issue.

The cases referred to are:

Cleveland, Cincinnati, Chicago & St. Louis Railway Company vs. Dettlebach, 239 U. S., 588,

and

Southern Railway Company vs. Prescott, 240 U. S., 632.

In the *Dettlebach* case, the plaintiff, Dettlebach, shipped goods under a bill of lading essentially identical with that here involved, and containing a released valuation clause, based on a difference in freight rates and also a clause providing for storage at destination if not removed within forty-eight hours after notice of arrival, subject to a reasonable storage charge, and to carrier's responsibility as warehouseman only. Notice of arrival was apparently given to the consignee on the date the goods arrived at destination, September 27, 1911, though not distinctly stated in the case as reported. They were not called for by the consignee and remained in the railroad's possession as warehouseman until November 1, 1911, when certain of the goods worth $2,792.00 were lost through the railroad's negligence. The carrier urged, unsuccessfully in the State court, that recovery could be had only in accordance with the released valuation clause of the bill of lading.

Mr. Justice Pitney voiced the unanimous opinion of this Court as follows, page 591:

> "The question is, whether the limitation of liability may be deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman. The Court of Appeals, recognizing the question as one of difficulty, reasoned thus:
>
> 'To occupy this twofold relation is of advantage to the company. As soon as the company can occupy it by replacing with it its

former relation as a common carrier, it obtains the benefit of the rule of ordinary care instead of the higher degree of vigilance which the law charges upon carriers for hire. And the company is further advantaged by an early shifting of its status as carrier to that of warehouseman, through its right in the latter capacity to charge for the storage of consigned goods, from the time when its relation to them as carrier ceases.'

"The court considered that the declaration of value stamped upon the bill of lading and signed by plaintiff's agent, carried no suggestion that it should inure to the advantage of a warehouseman after becoming inert for the relief of the carrier, and that the custody and protection of the goods as warehouseman is a distinct service from that of their transportation, and for its additional compensation may be charged; proceeding as follows: 'The additional compensation is not at all diminished in this case because of the agreement of limitation of liability. The reduction in the rate of carriage which can be used as a consideration to support that agreement, is no consideration for a like limitation of the liability as warehouseman, because there is no reduction in warehousing charges provided or stipulated for in the transaction. It is not easy to see why the consideration—not a large one—which is permitted to support the agreement to a limited liability on the

part of the carrier, should do double duty by serving also to uphold a like limitation of the liability of a warehouseman—the latter not agreeing to abate any part of proper storage charges. To so extend the contract of release would give an advantage to the warehouseman, but none to the owner. To allow that consideration would be to permit the carrier to cast off his obligation as carrier and take up a lighter burden, while he denies to the shipper all right to share in the benefit of the changed relation. The rate which the warehouseman may charge for storage remains unaffected by the release of liability as a carrier. The warehouseman could collect the reasonable value of his service whether the limitation of the carrier's liability was or was not stipulated. He could not be compelled to take less because of the stipulation. He could collect no more of the stipulation had not been made.'

"We recognize the cogency of the reasoning from the standpoint of the common-law responsibility of a railway company as carrier and as warehouseman. But we have to deal with the effect of an express contract, made for the purpose of interstate transportation, and this must be determined in the light of the Act of Congress regulating the matter. The question is Federal in its nature. *Mo. Kans. & Tex. Ry. vs. Harriman,* 227 U. S., 657, 672, *Atchison, etc., Ry. vs. Robinson,* 233 U. S., 173, 180.

"The provision that we have quoted from the contract is to the effect that 'every service to be performed hereunder' is subject to the conditions contained in it. One of these conditions is, in substance, that where a valuation has been agreed upon between the shipper and the carrier such value shall be the maximum amount for which any carrier may be held hliable, whether or not the loss or damage occurs from negligence. And that this, as a mere matter of construction, applies to the relation of warehouseman as well as to the strict relation of carrier, is manifest from the further provision that property not removed within 48 hours after notice of arrival may be kept 'subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only.' Thus, 'any loss or damage for which any carrier is liable' includes not merely the responsibility of carrier, strictly so called, but 'carrier's responsibility as warehouseman' also.

"And this is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act, (34 Stat. 584, Chap. 3591), which enlarged the definition of the term 'transportation' (this, under the original act, included merely 'all instruments of shipment or carriage') so as to include 'cars, and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or im-

plied, for the use thereof *and all services in connection with* the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, *storage,* and handling of *property transported;* and it shall be the duty every carrier subject to the provisions of this Act to provide and furnish *such transportation* upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. All charges made for *any service rendered or to be rendered in the transportation* of passengers or property *as aforesaid, or in connection therewith,* shall be just and reasonable; and every unjust and unreasonable charge *for such service or any part thereof* is prohibited and declared to be unlawful.'

"From this and other provisions of the Hepburn Act it is evident that Congress recognized the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like. The recommendation of the Interstate Commerce

Commission for the adoption of the uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight. It recognizes—whether correctly or not, is a question not now presented—the right of the carrier to make a charge, the amount of which has not been definitely fixed in advance, for storage as warehouseman in addition to the charge for transportation; but at the same time it recognizes that a valuation lower than the actual value may be agreed upon between the shipper and the carrier, or determined by the classification or tariffs upon which the rate is based; and it is a necessary corollary that what should be a reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods.

"We conclude that, under the provisions of the Hepburn Act and the terms of the bill of lading, the valuation placed upon the property here in question must be held to apply to defendant's responsibility as warehouseman.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion."

This opinion without the change of a single letter might have been written in the case at bar. It absolutely disposes of all the arguments both of

counsel for the shipper in the lower courts and of Mr. Justice Bissell in his opinion rendered at Special Term (page 40), where, without going as deeply into the underlying reasoning, he took the same position as the Ohio Court of Appeals in the *Dettlebach* case. It is conclusive in favor of the plaintiff-in-error.

The *Prescott* case (*supra*) is equally decisive of the point now at issue. There the facts were as follows:

Goods were shipped under tariff rules containing a provision that certain reduced rates specified would "apply on property shipped subject to the conditions of carrier's bill of lading," which provided for warehousing by the carrier unless removed by the consignee within forty-eight hours after notice of arrival, "subject to reasonable charge for storage and to carrier's responsibility as warehouseman only." After notice of arrival the consignee paid the entire freight charges and receipted for the goods. Part of the shipment was then taken away and the rest permitted to remain to meet the consignee's convenience in removal. While being thus held by the carrier, these goods were destroyed by fire. The position of the carrier was that the shipment had not lost its interstate character; that the provisions of the bill of lading were controlling; that the defendant's liability as warehouseman was governed by Federal law; and that the burden was upon the plaintiff to show negligence as a basis of recovery.

Mr. Justice Hughes delivering the unanimous opinion of the Court, says at page 636:

> "The question is whether this admitted transaction had the legal effect of discharging the contract governed by Federal law and of creating a new obligation governed by state law.
>
> "By the Act to Regulate Commerce (Sec. 1) the 'transportation' it regulates is defined as including 'all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.' It is made the duty of the carrier 'to provide * * * such transportation upon reasonable request therefor.' All charges made for 'any service' rendered in such transportation must be 'just and reasonable.' Section 6 requires that the carrier's schedules, printed as provided, 'shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee.' And it is further provided, in the same section, that no carrier shall 'extend to any shipper

> or person any privileges or facilities in the transportation'—that is, as defined—'except such as are specified in such tariffs.' The bill of lading in accordance with the published regulations provided that 'every service' to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the Company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service forming a part of the 'transportation' in the sense of the Federal Act and governed by that Act."

The learned justice then cites the *Dettlebach* case, (*supra*) quoting with approval from the opinion and continues, at page 638:

> "It is also clear that with respect to the service governed by the Federal Statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Tex. & Pac. Ry. vs. Mugg,* 202 U. S., 242; *Kansas Southern Ry. Co. vs. Carl,* 227 U. S., 639, 652; *Boston and Maine R. R. vs. Hooker,* 233 U. S., 97, 112; *Louis & Nash. R. R. vs. Maxwell,* 237 U. S., 94), and the established principle applies equally to any stipulation attempting to alter the provision

as fixed by the published rules relating to any of the services within the purview of the Act. *Chicago & Alton R. R. Co. vs. Korby,* 225 U. S., 155, 166; *Atchison, etc. Ry vs. Robinson,* 233 U. S., 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privilege or facilities,' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling and the parties cannot substitute therefor a special agreement.

"In determining, in this view, whether the contract had been discharged, and the case removed from the operation of the Federal Act, regard must of course be had to the substance of the transaction. The question is not one of form, but of actuality. *Texas & N. O. R. R. vs. Sabine Tram. Co.,* 227, U. S., 111, 126; *Louisiana R. R. Comm. vs. Tex. & Pac. Railway,* 229 U. S., 336, 341; *Illinois Central R. R. vs. Louisiana R. R. Comm.,* 236 U. S., 157, 163; *Pennsylvania R. R. vs. Clark Coal Co.,* 238 U. S., 456, 458. It is apparent that there had been no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in

advance of the transportation. The giving of a receipt for the goods by the consignee did not alter the fact that they were still held by the Railway Company awaiting actual de livery. The transaction at most could not be deemed to accomplish more than if the parties had agreed that until such delivery the goods should be held under a special contract—in lieu of the prescribed conditions, and this they could not affect without violating the Act which governed the shipment. It could not be said, for example, that while under the filed regulations the Railway Company was to make a 'reasonable charge for storage,' pending delivery that it could agree with a particular shipper, or consignee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. The actual service in holding the goods continued and we must look to the bill of lading to determine the legal obligation attaching to that service."

The court then holds that since the defendant proved that the goods were destroyed by fire, the burden was upon the plaintiff under the controlling Federal law, to show negligence on the part of the defendant to entitled the plaintiff to recover. Since it must be regarded as settled in the present case, that the copper was lost through the negligence of the carrier, no benefit can be derived from this branch of the decision.

If anything was left unsaid in the *Dettlebach* case that defect was remedied in the *Prescott* decision. When applied to the present facts, they authoritatively dispose of this phase of the litigation.

What is the present situation to which these Federal rules apply?

The tariff that governed the shipment had been duly filed with the Interstate Commerce Commission (page 7). The rates established for the service rendered were 18 cents per ton, when shipped at a released valuation of $100 per ton and 30 cents per ton when valuation not expressed (pages 7, 10). The shipper elected to ship at the lower rate with released valuation and paid the freight on the reduced basis (pages 7, 10). Thus the validity of the released clause is clearly established in the present suit. Had it spent its force? The copper was consigned to the New York Metals Selling Company at New York City (pages 7, 10). It was held at Buffalo for orders (pages 7, 10) for the accommodation of the shipper under an arrangement entered into before the goods left Houghton, Mich. (page 9). A confirmation of this storage was sent to the shipper by the Transit Company in the form of a letter enclosing a copy of I. C. C. Circular No. 236, which provided for storage and diversion of copper at Buffalo under certain conditions, viz.:

1. Four months free storage at Buffalo on shipments in transit.

2. After four months one-half per cent. per 100 pounds for each 30 days or fraction.

3. At owner's risk, and not accepted unless arrangements made previous to forwarding from Western Lake Ports.

4. Through freight rates applied to shipments ordered out of store.

5. Where no through rates in effect, local rates applied (page 9).

Both the bill of lading and the circular are part of the tariffs.

An examination of the two documents, particularly the clauses above quoted, shows beyond question that taken together they really make a single agreement. The bill of lading contemplated the issuance of the storage circular and the circular contemplated the bill of lading. They are interwoven and interdependent. The sending of the circular did not put an end to the bill of lading, but was simply a notice of the fulfillment of the agreement "to be held at Buffalo for orders," written on the face of the bill of lading.

This circular, the very instrument relied upon by the defendant-in-error as terminating the carriage and hence the operation of the bill of lading clauses, itself provides that the storage service will not be rendered unless arranged for prior to the forwarding of the goods from the point of shipment. The unity of the transaction is further emphasized by the provision that when ordered out of store by the shipper subsequent carriage would be at the through rate from the point of origin.

The contract provided for a passage, a storage and a subsequent passage. There is but one contract which provides for all the service to be rendered.

How much more clearly than even the *Dettlebach* case does this situation fall within the terms of Statute as amended by the Hepburn Act. How certainly is this storage one of the "services in connection with * * * the storage * * * of property transported," and the charges paid therefor a charge for a "service rendered, * * * in the transportation * * * of property as aforesaid, or in connection therewith." How surely is an unjust rate "for such service or any part thereof" prohibited and declared to be unlawful.

If the storage of goods upon consignee's failure to remove, as in the *Dettlebach* case, is a transportation service within the Act, how much more surely a part of such transportation is the storage requested in writing by the consignor at the inception of the transaction for his own benefit, provided for by the tariffs, schedules, bills of lading and circulars established under the Act, and concerning which the carrier with the approval of the Commission had established rates all of which were inseparable parts of the contract governing this particular shipment. If the interstate contract still persists and has not spent its force in the *Prescott* and *Dettlebach* cases, a *fortiori* is it binding in the case at bar.

Even if these two cases were not in the books, the trend of recent decision applies the Commerce

Act, particularly since the Hepburn Amendment to situations and services so closely analogous to the present storage in transit as to be conclusive.

Southern Pacific Terminal Company vs. Interstate Commerc Commission and Young, 219 U. S., 498 (wharf privileges for storage and handling of goods.

Railroad Commission of Ohio vs. Worthington, Receiver, etc., 225 U. S., 101. (Storage and transfer of coal from Ohio to upper lake ports.)

Southern Pacific Company vs. Interstate Commerce Commission, et al., 219 U. S., 433. (Wharf privileges for storage and handling of goods.)

Railroad Commission of Ohio vs. Worthington, Receiver, etc., 225 U. S., 101. (Storage and transfer of coal from Ohio to upper lake ports.)

Texas & New Orleans R. R. Co. vs. Sabine Tram Co., 227 U. S., 111.

Louisiana R. R. Commission vs. Texas and Pacific R. R. Co., 229 U. S., 336. (Free time for removal of freight.)

Greek American Sponge Co. vs. Richardson Drug Co., 124 Wis., 469. (Right of inspection.)

Allowances to Elevators by Union Pacific Railroad Co., 12 I. C. C., 86. (Elevation of grain.)

U. S., etc., vs. Union Stock Yards and Transit Company, 226 U. S., 286. (Live Stock service.)

I. C. C. vs. Diffenbaugh, 222 U. S., 42.

Union Pac. vs. Updike Grain Co., 222 U. S., 215. (Elevation of grain.)

Goldenberg vs. Clyde S. S. Co., 20 I. C. C., 527. (Storage in Transit.)

We would particularly call the court's attention to the *Goldenberg* case, where the situation was practically identical with that in the case at bar.

That was a proceeding before the Interstate Commerce Commission for reparation. An interstate shipment reached Philadelphia and before it was removed by the consignee storage charges accrued. No storage schedule had been filed by the carrier. After quoting from Sections 1 and 6 of the Act The Commission continues:

> "It is therefore obvious from the plain language of the act that defendant has failed to comply with the law by its omission to file a tariff stating the storage facilities which will be allowed at Philadelphia. It is also apparent that in the absence of a tariff of this nature defendant can discriminate as it pleases in the matter of storage between individual shippers. No case of such discrimination is proved by this record, but the tariff situation should not be such that discriminations between individual patrons of the company is possible thereunder.
>
> "This complaint will be dismissed, but if defendant does not within 30 days from the

date hereof file a tariff defining its storage privileges and charges at Philadelphia appropriate action will be taken to enforce compliance by it with the provisions of the statute."

Therefore upon both abstract theory and concrete authority the only conclusion which can be logically reached is that the storage in transit was incident to and an integral part of the transportation in interstate commerce and hence subject solely to the Federal rules governing such transportation.

POINT II.

Under the Federal Law the released valuation clause applies, and recovery can be had for only that proportion of the actual loss which the declared valuation bears to the actual market value.

That the released valuation clause in an interstate bill of lading when based upon a difference in freight rates is binding on the shipper, is no longer an open question.

Adams Express Company vs. Croninger, 226 U. S., 491, 509.

Wells Fargo & Co. vs. Neiman-Marcus Co., 227 U. S., 469.

Kansas City Southern Railway Company vs. Carl, 227 U. S., 639, 654.

Missouri, Kansas and Texas Ry. Company vs. Harriman, 227 U. S., 657, 668.

Boston & Maine Railroad vs. Hooker, 223 U. S., 97.

As shown under Point I the valuation clause applies to the case at bar, and the only question left is as to the interpretation thereof, and the rule of damages applicable thereunder as construed by the Federal law.

It has been urged that the measure of damages set forth in the heading of this point is erroneous, and that the true rule permits recovery up to $100.00 per ton based on the weight of the whole shipment, that is, up to an amount equal to $100.00 multiplied by the number of tons shipped.

Carleton vs. Union Transfer & Storage Co., 137 N. Y., App. Div., 225.

Barnes vs. New York Central and H. R. R. R., 138 N. Y., App. Div., 913.

These cases were relied upon by Judge Maul in his Decision and Opinion at the trial (page 35) as authority for rendering judgment for the plaintiff for the full market value of the copper not delivered.

The error underlying these cases is the failure to distinguish between a strict limitation of liability and an agreed valuation based on a difference in freight rates, and the consequent interpretation and application of the valuation clause in a manner which makes it a limitation of liability.

The case of *Railroad Company vs. Lockwood*, 84 U. S., (17 Wall.), 357, definitely established that where the Federal law is concerned an agreement between a shipper and a carrier that the latter shall be under no liability for its negligence is against public policy, void and unenforceable. This has been uniformly followed in the Federal Courts, and where the Federal law is applied.

Bank of Kentucky vs. Adams Express Co., 93 U. S., 174.
Hart vs. Pennsylvania R. R. Co., 112 U. S., 331, 448.
Adams Express Co. vs. Croninger, 226 U. S., 491, 509.

The courts have gone further, and held that a partial exemption is equally as obnoxious to public policy as a total exemption; the iniquity being merely less extensive.

Hutchinson on Carriers, Sec. 431.
The Kensington, 183 U. S., 263.
Hart vs. Pennsylvania R. R. Co., 112 U. S., 331.
Adams Express Co. vs. Croninger, 226 U. S., 491.
Kansas City S. Railway vs. Carl, 227 U. S., 639.

The precise ground of decision in the *Hart* case, and the many cases which have followed it, rests upon the distinction between an arbitrary limit set without regard to the value of the goods, and

for a purpose other than the fixing and applying of proportionate freight rates—a limit beyond which no recovery can be obtained by the shipper in case of loss or damage, and an agreed valuation of the lading which is itself reasonable, and upon which is based proportionate freight charges. The former is uniformly held invalid and unenforceable and the latter valid and enforceable.

Permitting recovery as in the *Carleton* and *Barnes* cases, *up to* an amount equal to the agreed value per ton multiplied by the total number of tons in the shipment, although only a fraction of the whole shipment was not delivered, must constitute a limitation of liability and hence be contrary to public policy.

This becomes apparent upon consideration of the result when reduced to figures.

The present shipment consisted of 50,010 pounds or approximately 25 tons of copper (page 10) of the actual market value of $288.40, per ton (page 2), or a total market value of $7,210. Had the entire shipment been lost, the recovery would have been $100.00 per ton or $2,500. If instead of a total loss, 16 1-3 tons worth $4,710 had been delivered to the shipper, and only 8 2-3 tons worth $2,500 not delivered, the shipper, under the rule in the *Carleton* case, would have received $4,710.00 in copper and $2,500.00, the full amount of the actual loss suffered, in damages.

According to this interpretation, the agreed valuation clause is effective only in order to entitle the shipper to obtain the benefit of a lower rate. The carrier is liable to the full extent of all the

damages sustained up to the stipulated value of the entire shipment which necessarily depends upon its size. The carrier receives no benefit unless the loss exceeds the given proportion of the entire shipment, which is a factor entirely outside the control of the carrier and even the Interstate Commerce Commission, and dependent solely on the ability or caprice of the shipper. Such an interpretation delimits recovery by an arbitrary sum determined solely by fortuitous circumstances. For example if an entire 8 2-3 ton shipment were lost, a recovery of $866.66 would be obtained; whereas if 8 2-3 tons of a 25-ton shipment were lost, the full actual market value, or $2,500.00 would be obtained. What chance would the small shipper have in competition with his large competitor? Such a condition would be the most flagrant form of unlawful discrimination. That such cannot be the intention of the carrier, or the shipper, or the intendment of the law, would seem clear. As is well stated in *Hutchinson on Carriers*, Section 429:

> "Where the parties have stipulated that the carrier's liability in case of loss shall not exceed the sum at which the goods are valued, it is hardly reasonable to suppose that it was thereby intended that the carrier, in the event of only a partial loss, should be liable for an amount which might be equal to the sum fixed as the value on the goods, thus making it possible for the same amount to be recovered where the loss was only partial as would be recoverable where the loss was total."

Take another case; suppose that a competitor of the present shipper had shipped the same amount of copper of the same value at the same time, under precisely the same circumstances, but that he paid the higher, 30 cent, freight rate, thereby obtaining complete coverage of the value of his goods through the usual carrier's common law liability. Suppose that 8 2-3 tons of his copper was also lost through the negligence of the carrier. Undoubtedly he would be entitled to recover the full market value, to wit, $2,500.00.

However, he is in no better position than the shipper in the case at bar, although he has paid a higher freight rate for the purpose of obtaining additional protection. The fact that the same service is tendered to different shippers at different rates, brings the situation, under this interpretation, within the prohibition of preferences contained in the Interstate Commerce Act.

Again, this contention applied to the facts first above assumed, would permit the shipper to retain his 16 1-3 tons of copper worth $4,710, together with the sum of $2,500, which has been agreed by him to the value of the entire shipment. Had the entire shipment been lost, he would have been entitled to but one item of $2,500. Since the shipment was only partially lost, he receives that item almost threefold. Surely such was never the intention of the parties. The intention was rather that for all purposes of the shipment, the copper and every last fraction thereof was agreed to be worth *at the rate of* $100 *per ton, or* 5 *cents per pound, or* 3 1-3 *mills per ounce.* The shipper desired to enter

into this agreement and was willing to take the risk of loss beyond that value for the purpose of obtaining a reduced freight rate, and the carrier was willing to give such reduced rate in exchange for the lessened risk which he must bear.

The clause "Not to exceed $100 per ton. Limited by written agreement," and the written agreement referred to which bases the valuation on difference in rates, must necessarily establish and fix a ratio and not an arbitrary limit of recovery if the clause is valid and enforceable in any manner. Otherwise it would fall under the prohibition of the *Lockwood* case, and the other cases above cited. It has been urged and the trial court seems to have based its findings upon the proposition that since the carrier is protected from liability beyond the fixed sum determined by the weight of the entire shipment, a due proportion between the responsibility and the freight has been obtained, and the requirement of the *Hart* case standing alone has been met. However this is not an adequate answer because as has been just said, we are once more brought back to the insuperable objection that such an interpretation is a strict limitation and not a valuation and as such is against public policy and unenforceable.

Railroad Company vs. Lockwood, 84 U. S. (17 Wall.), 357.

Bank of Kentucky vs. Adams Express Co., 93 U. S., 174.

Adams Express Co. vs. Croninger, 226 U. S., 491.

That such is not the case cannot be questioned, since the decision of the *Croninger* and *Carl* cases, *supra.*

Moreover it is provided in the bill of lading that:

> "The amount of any loss or damage * * * shall be *computed* at the value of the property * * * unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such *computation.*"

It is the amount of loss which shall be computed, not the amount of liability.

There are numerous decided cases where the measure of damages has been applied in accordance with the rules stated in the heading. Some of these cases are the following:

Goodman vs. M. K. & T. Ry. Co., 71 Mo. App., 460.

St. L. I. M. & S. Ry. vs. Lesser, 46 Ark., 236.

Shelton vs. Canadian Northern Ry. Co., 189 Fed. Rep., 153, 160.

United Lead Company vs. Lehigh Valley R. R. Co., 156 N. Y., App. Div., 525.

Pearse vs. Quebec Steamship Co., 24 Fed. Rep., 285.

Frank vs. Michigan Central R. R. Co., 169 N. Y App. Div., 69.

In the *Goodman* case, the plaintiff shipped household goods under a bill of lading containing, in consideration of a reduced rate, a valuation clause of five dollars per hundred pounds. The goods were damaged to the extent of $32.50, and recovery allowed to that amount, although it was in excess of the stipulated valuation. In reversing the judgment the court said at page 463:

> "By the terms of the special contract shown in this case, plaintiff could not have recovered if there had been a total loss of any article of furniture more than $5.00 per hundred pounds. It is clear that for a partial loss of such article he could not recover on a basis of the actual value of the goods, but only the proportionate value fixed by the contract, and so the trial court instructed the jury. *Pearse vs. Steamship Co.*, 20 Fed. Rep., 285; *Railway vs. Lesser*, 46 Ark., 236. But the jury seem not to have heeded such instruction. The evidence in plaintiff's behalf tended to show the actual loss or damage to the goods, without reference to the limit fixed by the contract and the verdict shows that he was permitted to recover the actual amount of damage without reference to a proportionate reduction made necessary by the contract."

In the *Lesser* case (46 Ark., 236), horses were shipped under a livestock contract containing a provision based on a reduced rate, that in case of

total loss the carrier should be liable for the cash value at point of shipment, but not in excess of $100 per head, and in case of partial loss not to exceed the same proportion. The horse which was damaged was worth before the injury, $150.00, and afterward $70.00.

The trial court, at the request of the defendant, instructed the jury as follows, at page 243:

> "If the jury find from the evidence that the plaintiff entered into a contract with the defendant that even in case of loss or damage occurring through the defendant's 'gross negligence,' plaintiff bound himself to place no higher value upon any single animal shipped than one hundred dollars; then for a partial loss the measure of damages is, what proportion of one hundred dollars said horse was lessened in value by reason of the injury."

The court, over the defendant's objection, added words: "provided the jury find the valuation was agreed on in consideration of special rates." The Supreme Court of Arkansas, upheld the instruction as requested and said as to the added clause:

> "There was no evidence to disprove the statements made in the contract that the rates agreed to be paid for the transportation of the stock were less than the regular rates."

and sustained the contract on the authority of *Hart vs. Pennsylvania Railroad Company,* 112 U. S., 331, saying at page 244:

"The jury returned a verdict in favor of plaintiff for $80.00 damages. They evidently took the difference between the value of the horse before and after he was injured as the measure of damages. According to this standard, the verdict should have been for $53.33, the proportion of $100.00 the horse was lesened in value by the injury.

If appellee shall enter a remittitur here of $26.67, the difference between $80.00 and $53.33, within the next fifteen days, according to the rules of this court, the judgment of the court below will be affirmed; otherwise it will be reversed, and this cause will be remanded with instructions to the court below to grant defendant a new trial."

This case shows that if the proportional interpretation of the bill of lading clauses now under discussion is the correct one, there is nothing in the cases of *Hart vs. Pennsylvania R. R. Co.*, 112 U. S., 331, or *Railroad Company vs. Lockwood*, 17 Wall., 357, to prevent its enforcement.

There can be no doubt as to this since the same proportional clause existed in the livestock contract in *Cramer vs. Chicago, Rock Island & Pacific Ry. Co.*, 153 Ia., 103; 133 N. W., 387. This contract was upheld as valid and enforceable by this Court, under the title of *Chicago, Rock Island & Pacific Ry. Co. vs. Cramer*, 232 U. S., 490.

In *Shelton vs. Canadian Northern Railway Company*, 189 Fed., 153, the facts are very similar to those in the present case. There was a shipment

of live stock and household goods made in one car under a contract containing a provision that a carrier should not be responsible for an amount exceeding $1,200 for the contents of the car. The property was injured through the negligence of the carrier, and the court permitted recovery to be had only in accordance with the prorating theory, saying at page 160:

> "Upon the question of the loss of property I shall charge the jury that the railroad company is liable for the value of the property which was destroyed by the collision, and that the loss is to be ascertained by determining what proportion that part of the property which was destroyed was to the entire amount of property carried. If they decide that it is ten-seventeenths of the entire amount carried, then the plaintiff is entitled to recover, ten-seventeenths of $1,200, which was the maximum amount fixed by the contract as the value of the contents of the car."

A case absolutely upon all fours with the present is *United Lead Co. vs. Lehigh Valley R. R. Co.*, 156 N.Y.App. Div., 525; 141 Supp., 310. There the defendant accepted from the plaintiff at New York for shipment to Chicago, a carload of pig tin, consisting of 320 pigs, each of substantially the same size, weighing 33,662 pounds in all; 40 of the pigs weighing 4,150 pounds were lost in transit. Tariffs had been duly filed pursuant to the Interstate Commerce Act, whereby the rate for shipment in

question was 23 cents per hundred pounds, when "released to valuation of $100 per ton, of 2,000 pounds, to be shown on bills of lading and shiper's invoice," and 30 cents per hundred without any agreement as to valuation. The goods were shipped at the lower rate, the bill of lading containing the following clause, at page 526:

> "For the purpose of enabling the carrier to apply proper published rate as explained in its tariff, we hereby declare that in case of loss or damage to the property herein described, we will not assert claim against the carrier on a higher basis of value than one hundred dollars per ton."

The court says (at page 526):

> "The actual value of the tin lost was $1,608.13, which sum the plaintiff claims it is entitled to recover, while the defendant contends it is only liable at the rate of $100 for each ton or fraction thereof lost, or $207.50."

The court then held that an agreed valuation, in consideration of a reduced rate is valid under the recent Supreme Court cases.

The court further held that the bill of lading did not conflict with the published tariffs, but was simply explanatory of the rate and that the rights of the parties are determined by it. The court goes on to say (page 526):

> "The plaintiff expressly agreed, when it shipped by the lower rate, that in case of loss

or damage, it would not assert a claim—that is, that the defendant should not be liable—to exceed $100 per ton for the tin lost or damaged.

Defendant had a right to enter into this agreement because, as indicated, it did not conflict with the published rate. Plaintiff however, contends it could only ship under the rate which it accepted, an entire carload, which, in the present case, according to the submission, was of the value of $1,800; that therefore, it is entitled to recover the full value of the tin lost so long as it does not exceed the value of the entire car load. In my opinion this is not a fair construction to be put upon the published rate, supplemented and explained as it was, by the clause stamped upon the bill of lading.

"In *Kansas City S. Ry. Co. vs. Carl*, 227 U. S., 639, the shipment consisted of two boxes and one barrel, containing 'household goods.' On the bill of lading was written, 'O. R. Val, 5.00 Cwt.' which meant 'Owner's released valuation $5 per hundredweight.' One of the boxes was never delivered and action was brought to recover its value. A recovery was had for the full value against the shipper which was reversed, the court saying (p. 655):

> 'In the light of the published tariffs and of the rate applied to this shipment, the two papers read together plainly mean that the household goods included

> in the two boxes and one barrel were valued for the purpose of coming under the lower rate, at $5 per hundred.'
>
> The rule there laid down is directly applicable to the case here under consideration, and when applied the plaintiff is entitled to recover at the rate of $100 for each ton or fraction thereof lost. * * * It follows, therefore, that the plaintiff is entitled to judgment against the defendant for $207.50, and interest thereon from December 1, 1911, without costs."

As is said in the case of *Pearse vs. Quebec Steamship Co.*, 24 Fed. Rep., 285:

> "The limiting clause in this case must be construed as applying distributively upon each article damaged because that is the most natural meaning of the words, and that best accords with the presumed intention of the parties. The clear intent to provide not merely for the loss of the whole shipment or for damage to the whole shipment, but for the loss for any part, and for damage to any part. When it is stipulated that in case of damage or loss, the shipowner 'will not be liable for more than the invoice value of the goods,' the goods referred to are plainly the goods damaged, and those only; otherwise, the clause would not be valid."

In *Frank vs. Michigan Central R. R. Co.*, 169 N. Y. App. Div., 69, 154 N. Y. Supp., 701, the

court applied this proportional rule to damage to horses and said at page 69:

> "The plaintiff chose the lower published tariff rate, based upon the condition that the carrier assumed liability on the horses to the extent only of an agreed valuation, upon which valuation as recited in the contract was based the rate charged for the transportation of the animals, and beyond which valuation neither the defendant nor any connecting carrier should be liable. The valuation of the horses, as stated in the shipping contract, was not to exceed $100 each, and in no event should the carrier's liability exceed $1,200 upon any car load.
>
> The plaintiff contends that he is entitled to recover the entire loss, because it is less than the amount limited by the terms of the shiping contract. The defendant contends, first, that it is not liable for any of the loss, because the evidence shows that the horses were worth, after being injured, more than the valuation placed upon each of the horses, and second, that in any event it is not liable for more than such proportion of the actual loss as the declared valuation bears to the actual value, namely $230.24. The actual loss sustained by the plaintiff was $888.82, there being a loss upon each of the horses except two, but none of the horses was worth less than $100 after the injury.
>
> I am of the opinion that the plaintiff is entitled to recover, but only the lesser amount.

I shall not stop to analyze the various decisions which have been cited. It is not claimed that any are precisely in point, and I am not aware of any authoritative decision upon the exact question here involved. The reasoning of the cases, I think, sustains the conclusion here reached."

"Judgment is therefore directed in favor of the plaintiff against the defendant for the sum of $230.24, together with interest thereon from the 7th day of August, 1911, the date of delivery of the animals by the defendant carrier to the plaintiff, together with costs."

These cases being decided by the lower courts of the country have but pursuasive authority and in no wise binding, but it seems clear that this Court has applied the very rule now urged by the Transit Company in the case of *Kansas City Southern Railway Co. vs. Carl*, 227 U. S., 639.

In that case household goods weighing 400 pounds were shipped interstate at a released valuation of 5 ~~cents~~ dollars per 100 pounds, based on freight rate. Part of the shipment, weighing not over 200 pounds, of the market value of $75, was lost, and recovery obtained for that amount. This court reversed the judgment below and enforced the valuation clauses saying at page 655:

"It is difficult not to see, when we read the bill of lading and the release, with its note, in the light of the filed rate sheets and the rate paid upon this shipment corresponding

to the lower of two rates upon household goods, that the consignor and the carrier mutually understood that these boxes and this barrel contained household goods *of the average value per hundred weight of five dollars.*"

Necessarily this average value must apply uniformly throughout the lading and damages must be paid to the owner at the rate of $5 per 100 pounds, 5 cents per pound, or 3 1-8 mills per ounce.

No other rule will do justice or avoid preferences and discrimination.

Nor is this proportionate rule of damages new in principle. It is familiar through valued marine insurance policies. Whether or not the valuation clauses in bills of lading were derived from that source, to the similarity between the situations is striking.

One of the leading cases on valued marine insurance policies is that of *Lewis vs. Rucker,* 2 Burrows, 1167, decided in 1761. The question there arose on a policy covering sugar valued at L30 per hogshead.

Upon arrival at destination, it appeared that every hogshead of sugar had been damaged by sea water. The price which the goods brought by reason of the damage and that which they might have sold for if they had been sound, was as L20, 0s. 8d. per hogshead is to L23, 7s. 8d. That is, if sound they would have been worth L23 7s. 8d. per hogshead; as damaged they were worth only L20 0s. 8d. per hogshead.

The only question at the trial was, by what measure or rule the damage ought to be estimated. The court said at page 1169:

> "The defendant takes the proportion of the difference between sound and damaged at the port of delivery, and pays *that proportion* upon *the value* of the goods *specified in the policy;* and has no regard *to the price in money,* which either the sound or damaged goods bore in the port of delivery. He says, the proportion of the difference is *equally* the rule, whether the goods came to a *rising* or a *falling* market. For instance, suppose the value in the policy L30—they are damaged, but sell for L40., if they had been sound, they would have sold for L50—the difference is a fifth; the insurer then must pay a fifth of the *prime cost, or value in the policy* (that is L6). *E converso;* if they come to a losing market, and sell for L10, being damaged, but would have sold for L20 if sound, the difference is one-half; the insurer must pay half the *prime cost,* or *value in the policy* (that is L15). To this rule two objections have been made.
>
> First Objection: That it is going by a *different measure* in the case of a *partial* from that which governs in the case of a total loss; for, upon a total loss, the prime cost, or value in the policy, must be paid.
>
> Answer: The distinction is founded in the nature of the thing. Insurance is a contract

of indemnity against the perils of the voyage; the insurer engages, so far as the amount of the prime cost, or value in the 'policy' that the thing shall 'come safe;' he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods; if they be *totally* lost, he must pay the *prime cost,* that is the value of the thing he insured at the outset; he has no concern in any subsequent value.

So likewise, if part of the cargo, capable of a several and distinct valuation at the *outset,* be totally lost; as if there be 100 hogsheads of sugar, and ten happen to be lost, the insurer must pay the *prime* cost of those 10 hogsheads, without any regard to the price for which the other 90 may be sold.

But where an entire individual, as one hogshead happens to be *spoiled,* no measure can be taken from the prime cost to ascertain the quantity of such damage; but if you can fix whether it be a 3rd, 4th or 5th, worse, the damage is fixed to a mathematical certainty. How is this to be found out? Not by any price at the outset port; but it must be at the port of *delivery,* where the voyage is completed, and the whole damage known. Whether the price there be high or low, in either case it *equally* shews whether the damaged goods are a third, a fourth or a fifth, worse than if they had come sound; consequently, whether the injury sustained be a third, fourth, or fifth, of the value of the thing; and, as the insurer

pays the *whole prime cost,* if the thing be *wholly* lost; so, if it be only a third, fourth, or a fifth worse, he pays a third, fourth, or a fifth, of the *value* of the goods so *damaged.'*

"In opposition to the measure the jury have gone by, the plaintiffs contend, that they ought to be paid the whole value in the policy, upon one of *two* grounds.

1st, because the general rule of estimating should be the difference between the *price the damaged goods sell for,* and the *prime cost* (or value in the policy). Here, the damaged goods sold at L20 0s. 8d., *per hogshead;* and the underwriter should make it up L30.

Answer: It is impossible *this* should be the rule. It would involve the underwriter in the *rise or fall* of the market; it would subject him, in some cases, to pay *vastly more than the loss;* in others, it would deprive the insured of *any satisfaction, though there was a loss.*

For instance—Suppose the prime cost or value in the policy L30 *per hogshead;* the sugars are injured; the price of the best is L20 a hogshead; the price of the damaged is L19 10s—The loss is about a fortieth, and the insurer would be to pay above a third.

Suppose they come to a rising market, and the sound sugar sell for L40 a hogshead, and the damaged for L35., the loss is an eighth; yet the insurer would be to pay nothing."

This marine insurance rule has been followed by this Court in *London Assurance vs. Companhia de Moagens do Barreiro,* 167 U. S., 149, where the court says at page 171:

> "It is then to be determined what the goods would have been worth in the same market had they been sound, and the difference between the sound value and the proceeds of the sale of the damaged article gives the ratio of deterioration, and the underwriter is to pay this ration or percentage of loss on the policy value."

These cases clearly show the equities underlying the law of valued marine policies. The analogy between these policies and the situation now in question is so perfect that the equities are equally forceable here. If the present question was not decided in the *Carl* case, it would seem to be one of the first impression before this Court, and the equities of the situation should be thoroughly considered with particular reference to the opportunities for preference and discrimination which the upholding of any measure of damage other than the proportionate will necessarily produce.

The reasoning of these insurance cases, and even more strongly the reasoning of the *United Lead Co.,* case and the *Carl* case, uphold the contention of the plaintiff-in-error, and dispose of the decisions of the *Carleton against Union Transfer and Storage Company,* 137 N. Y. App. Div., 225, 121 N. Y. S., 997, and *Barnes against*

N. Y. C. & H. R. R. R. Co., 138 N. Y. App. Div., 913, (decided on the authority of the *Carleton* case).

The only interpretation of the valuation clauses held valid under the *Croninger* case, which will not bring them under the prohibition of the *Lockwood* case, is the interpretation that they afford a basis of recovery, the recovery to be computed upon the value stipulated, and that where a partial loss occurs, recovery can be had for that proportion of the actual loss which the declared valuation bears to the actual market value.

POINT III.

That judgment should be reversed with costs

LESTER F. GILBERT,
Counsel for Plaintiff-in-error,
903 Telephone Bldg.,
Buffalo, N. Y.

PRESS OF "THE BUFFALO COMMERCIAL."

(24,659)

SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 104

WESTERN TRANSIT COMPANY,

Plaintiff-in-Error,

AGAINST

A. C. LESLIE & COMPANY, LTD.,

Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR

STATEMENT OF CASE

The statement of case contained in the brief for the petitioner, so far as it states the facts, is sufficiently accurate for the purpose of this appeal except for one statement. On page 5 it contains the following sentence referring to the copper:

> "It was at once placed in the Western Transit Warehouse (page 28), and on November 26, 1908, the plaintiff-in-error wrote the Leslie Company advising of the arrival and notifying them that the goods would be held at Buffalo as directed by the bill of lading subject to storage circular I. C. C. No. 236, copy of which was enclosed (pages 7, 8)."

The words "notifying them that the goods would be held at Buffalo as directed by the bill of lading" are inaccurate if they are intended to refer to the contents of the letter. The letter makes no reference whatever to the bill of lading, but consists of two sentences only, as follows:

> "Replying to your letter of 24th inst., would advise you that we have in storage here lot of 1,036 ingot bars of copper marked M. N. 102, as well as lot of 979 ingot bars marked M. N. 97. This copper came finished in our steamer Buffalo, which unloaded here September 30, and will be held subject to our storage circular I. C. C. No. 236, copy of which we enclose."

This letter contains no intimation that the storage was in any way covered by the bill of lading.

POINT I.

The contract of storage is an independent contract based upon the storage circular, and such contract is entirely independent of the bill of lading, and the agreed valuation clause in the bill of lading cannot be read into the storage contract.

After the arrival of the copper in Buffalo the plaintiff-in-error sent the defendant-in-error a letter informing the defendant-in-error that the copper would be held pursuant to the terms of the storage circular (page 8).

An independent contract in relation to storage has been held in several jurisdictions to arise out of circumstances similar to those involved in this case.

Dimmick vs. Milwaukee & St. Paul Ry. Co., 18 Wis., 471.

Mitchell vs. Lancshire & Yorkshire Ry. Co., 10 Q. B. L. R., 256.

In re Webb, 8 Taunton, 443.

United Fruit Co. vs. N. Y. & Baltimore Transportation Line, 104 Md., 567.

While the recent cases of *Southern Railway Co. vs. Prescott* (240 U. S., 632), and *Cleveland, etc., Railway Company vs. Dettlebach* (239 U. S., 588), (both decided since the decision of the case at bar by the Appellate Division of the Supreme Court of the State of New York), seem conclusive upon the point that storage, as an incident to transportation, may be made a part of interstate commerce if the provisions as to such storage are included in the terms of the bill of lading, in this case we have no such question, for the storage in Buffalo, interrupting transportation, is not referred to in the bill of lading, and is not covered by any term of that instrument, but is covered by a wholly separate tariff, making no provision for a limitation to an agreed valuation or other limitation of liability.

The only clause in the bill of lading which the plaintiff-in-error can even suggest as referring to the Buffalo transaction is the clause "to be held

at Buffalo for orders." This clause is certainly not unusual in transportation contracts, but, we submit, has no application to a storage in a warehouse for months under a tariff schedule entirely independent of the tariff for carriage.

In the *Dettlebach* case particular stress is laid upon the circumstance which distinguishes that case from the case at bar, the Court there saying:

> "The provision that we have quoted from the contract is to the effect that 'every service to be performed hereunder' is subject to the conditions contained in it. One of these conditions is, in substance, that where a valuation has been agreed upon between the shipper and the carrier such value shall be the maximum amount for which any carrier may be held liable, whether or not the loss or damage occurs from negligence. And that this, as a mere matter of construction, applies to the relation of warehouseman as well as to the strict relation of carrier, is manifest from the further provision that property not removed within 48 hours after notice of arrival may be kept 'subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only.' Thus, 'any loss or damage for which any carrier is liable' includes not merely the responsibility of carrier, strictly so-called, but 'carrier's responsibility as warehouseman' also."

And similarly in the *Prescott* case, the opinion contains the following:

"The bill of lading in accordance with the public regulations provided that 'every service' to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the Company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival."

The counsel for the plaintiff-in-error has argued elaborately a number of propositions which, in the view of the defendant-in-error, have no bearing on the case as it now stands. Our contention is, we repeat, that the storage under the circumstances in this case was not a service covered by the bill of lading, but was fully covered by a separate and independent contract, no term of which limited in any way the liability of the warehouseman for the full value of the commodity lost through the admitted negligence of the plaintiff-in-error.

POINT II.

The judgment should be affirmed, with costs.

DANIEL J. KENEFICK,
Counsel for Defendant-in-Error,
1330 Marine Bank Bldg.,
Buffalo, N. Y.

CHARLES B. SEARS,
On the Brief.